

The Industrial Accidents Division asks the Utah Labor Commission to review Administrative Law Judge Marlowe's order vacating the noncompliance penalty imposed by the Division against Pullman Construction LLC ("Pullman") pursuant to §34A-2-211 of the Utah Workers' Compensation Act.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12, §34A-2-211(4)(c), and §34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

The underlying facts of this case are inter-related with Jeremy Reynolds' claim for workers' compensation benefits, referenced as Reynolds v. S.C. Nelson, et al., Case No. 05-0351. In summary, Mr. Reynolds injured his hand in a roofing accident on October 15, 2004. Mr. Reynolds filed an application for workers' compensation benefits with the Commission's Adjudication Division. In the application, Mr. Reynolds named S.C. Nelson Construction as his employer at the time of injury. S.C. Nelson Construction responded to Mr. Reynolds' application by asserting that Pullman, rather than S.C. Nelson Construction, was Mr. Reynolds' employer at the time of injury. Because neither of these putative employers carried workers' compensation insurance, the Adjudication Division added the UEF¹ as an additional respondent to Mr. Reynolds' claim.

On March 22, 2005, while Mr. Reynolds' claim was pending hearing, the Industrial Accidents Division assessed a penalty of \$21,122.56 against Pullman pursuant to §34A-2-211 of the Act, for failure to maintain workers' compensation insurance. On April 20, 2005, Pullman appealed the Division's penalty assessment. The penalty dispute was transferred to the Adjudication Division, assigned to Judge Marlowe, and consolidated for hearing with Mr. Reynolds' claim for benefits.

The evidentiary hearing on the two consolidated cases was scheduled for October 19, 2005. Mr. Lawrence, who represents both the UEF and the Division, received notice of the hearing. Furthermore, on June 21, 2005, Judge Marlowe wrote to Mr. Lawrence specifically in his capacity as the Division's attorney. Judge Marlowe's letter dealt with litigation procedure applicable to the Division's penalty assessment against Pullman. Neither then nor later did Mr. Lawrence or the Division advise Judge Marlowe that Mr. Lawrence was not representing the Division with respect to that matter.

At the commencement of the evidentiary hearing on October 19, 2005, Mr. Lawrence advised Judge Marlowe that he only represented the UEF with respect to Mr. Reynolds' claim for benefits, and did not represent the Division regarding its penalty assessment against Pullman. This left the Industrial Accidents Division with no representation of any sort at the hearing. Judge

¹ Pursuant to §34A-2-704 of the Act, the UEF pays workers' compensation benefits to the injured employees of employers who lack insurance or other resources sufficient to pay the benefits.

Marlowe therefore orally dismissed the Division's penalty assessment at the hearing. She later confirmed that action in her written decision issued on March 20, 2006.

The Industrial Accidents Division now asks the Commission to set aside Judge Marlowe's decision and excuse the Division's failure to appear for hearing on October 19, 2005. The Division argues that it did not receive proper notice of the hearing because notice was not sent to the Division or to Darci Tolbert, another attorney who represents the Division in such matters.

DISCUSSION AND CONCLUSION OF LAW

The adjudicative file establishes that Mr. Lawrence received notice of all proceedings in this matter, including the evidentiary hearing scheduled for October 19, 2005. The Division does not dispute Judge Marlowe's finding that the Division had previously instructed the Adjudication Division that Mr. Lawrence would represent the Division in penalty cases. Furthermore, Judge Marlowe's letter to Mr. Lawrence on June 21, 2005, should have put Mr. Lawrence and the Division on notice that 1) the penalty case had been set for hearing and 2) Mr. Lawrence was the Division's attorney of record in that case.

In light of these facts, the Commission concludes that Judge Marlowe complied with the Industrial Accidents Divisions' instructions by sending all notices of hearing to Mr. Lawrence. The fact that the Division may have had some other intention, which was never communicated to the Adjudication Division, is not a sufficient reason to excuse the Industrial Accidents Division from its failure to appear and prosecute its assessment against Pullman Construction LLC.

ORDER

The Commission affirms Judge Marlowe's order and denies the Division's motion for review. It is so ordered.

Dated this 15th day of May, 2006.

R. Lee Ellertson
Commissioner